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THE 2012 RECOMMENDATION CONCERNING NATIONAL FLOORS OF SOCIAL PROTECTION (NO 202)

THE HUMAN RIGHTS APPROACH TO SOCIAL SECURITY IN ILO WRAPPING PAPER.

GIJSBERT VONK*

I. INTRODUCTION

The International Labour Organisation (ILO) has a long tradition of developing minimum social security standards. However, the value of these instruments is increasingly criticised. A central point in this criticism is that the standards are not based upon the notion of a right to social security for all and therefore fail to address the problem of lack of coverage that exists in large parts of the world. Here the standards are often contrasted with the human right to social security which is based on a right to social security for all. It is hoped that the 2012 Recommendation (No 202) concerning national floors of social protection¹ will help to bridge the gap between ILO standards and the human rights approach to social security. Has this gap truly been bridged, or is the human rights approach fundamentally different from the standard-setting approach of the ILO? This is the central question posed in this paper. After a short introduction to the social protection debate in the ILO, we reflect on the differences in nature between the ILO standards and the human rights approach, in particular by comparing the modern interpretation of the right to social security, as adopted in the UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 19,² with the classic ILO standards approach. In the next section we will investigate to what extent the differences in approach are mitigated by the Social Protection Floors Recommendation. In the penultimate section we will discuss the complementary role of ILO standards to the human rights approach and raise the question of whether the older ILO social security standards, in particular Convention No 102, are still suitable to play such role. The paper concludes with a résumé.

II. THE BACKGROUND TO THE ILO SOCIAL PROTECTION (SOCIAL SECURITY) DEBATE

Social security is one of the four strategic pillars of the Decent Work Agenda determined by the International Labour Conference in 1999.³ The agenda calls for the expansion of social security coverage, adapted to social change, better matched to the developments on the labour market, and better managed. In the wake of these demands the ILO launched a Global Campaign on Social Security in 2003. This campaign focused on expanding the functioning of the social security system in the poorer countries. The objective was to broaden the scope of the system to cover individuals that are not included in it as yet. The existing minimum standards that the ILO has developed for social security should be used in doing this.⁴

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1 Prepared by the International Labour Office for the 101st session in 2012, *Social Protection Floors for Social Justice and a Fair Globalization*, and adopted in June 2012 as a *Social Protection Floors Recommendation, 2012 (No 202)*.

2 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19.

3 *Decent Work*, Report of the Director-General, International Labour Conference, 87th session, Geneva, 1999.

4 See Resolution and Conclusions concerning social security, International Labour Conference, 89th session (2001).

The most important instrument for the development and expansion of social security at the ILO's disposal is ILO Convention No 102. The ILO refers to this convention proudly as the flagship of social security conventions. It dates from 1952 and set standards for social security as a whole. The intention is that poor countries will gradually broaden the scope of their social security so that they can become party to this convention.

The value of ILO Convention No 102 for the expansion of social security in poorer countries has, however, proved to be limited. The convention has been ratified by only 47 countries, almost though not quite all of them richer countries. The most recent awareness campaign from the International Labour Office resulted in some new ratifications, mostly from the former East European block, including Albania (2006), Bulgaria (2008), Montenegro (2006), Poland (2003), Romania (2009) and Uruguay (2010).

Convention No 102 demonstrates a preference for public schemes⁵ and to a lesser extent for social insurance⁶ (be it employment-based or universal). These preferences are founded in the industrial age of Western countries, but are not always suitable to meet the needs of today's poorer countries. In particular, the size of the informal economic sector in these countries poses a problem. The rudimentary social insurance systems that have developed in poorer countries cover individuals who work in the formal economy, like civil servants and employees in regulated sectors. However, the large majority of such populations work in the informal sector and this sector is still growing. As long as this is the case, expansion of social insurance to broader layers of the population remains an illusion.⁷

While the extension campaign of the ILO was thus grinding to a halt, new energy was generated by the UN Committee on Economic, Social and Cultural Rights (CESCR). The CESCR is the committee of human rights specialists that monitors the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In order to clarify the socio-economic fundamental rights contained in the covenant, the CESCR develops so-called General Comments. For a long time, the right to social security as contained in article 9 of the covenant had not been the subject of a General Comment, as the committee continued to refer the matter to the competence of the ILO,⁸ but the latest General Comment, No 19, adopted in November 2008, put an end to this.⁸ This 20-page document contains a dynamic framework for applying the right to social security in a global context. While this framework is applicable and indeed useful for all countries in the world, it focuses in particular on the question of how poorer countries should set up their social security systems.

With General Comment No 19, the human rights approach to social security was increasingly contrasted (or even advocated as an alternative) to the ILO approach.⁹ While the human right to social security applies to everyone (as a member of society),¹⁰ ILO

5 The 'public bias' is expressed in art. 6 of Convention No. 102: if insurance is not made compulsory by national laws or regulations, it can only be taken into account when the scheme 'is supervised by the public authorities or administered ... by [the] joint operation of employers and workers'. This would exclude voluntary private arrangements.

6 'The insurance bias' rather follows from the contingency approach which follows the pattern of insurable social risks; general need is not included as a separate contingency. On the other hand, art 71 (1) Convention no. 102 also envisages general taxation as a source of financing. The preference for insurance emerges more explicitly from art. 2 of the Recommendation concerning income security that preceded ILO Convention No. 102: 'Income security should be organised as far as possible on the basis of compulsory social insurance ...'.

7 See Armando Barrientos, 'The Role of Tax-Financed Social Security' (2007) 60(2-3) *International Social Security Review* 99.

8: Committee on Economic, Social and Cultural Rights (2008) *General Comment No. 19: The Right to Social Security* <<http://daccess.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement>>.

9 Cf. some of the contributions in Eibe H Riedel (ed), *Social Security as a Human Right, Drafting a General Comment on Article 9 ICESCR* (Springer, 2007).

10 Cf. art.22 of the Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

Convention No 102 is already satisfied when a certain percentage of the (working) population is covered. Moreover, while welfare systems financed from public resources are a more effective instrument to bring larger groups of people under the protection of social security, no specific standards have been developed for social assistance, at least not directly. Nor is Convention No 102 geared towards other problems with which poorer countries struggle, like the social effects of AIDS, failed harvests and natural disasters.¹¹ Such misfortune calls for other remedies, like healthcare initiatives, employment projects for the poorest of the poor, micro-credit and support for informal forms of social security.

It is against the backdrop of the emergence of the human right to social security on the international scene that the ILO started to look for new strategies for the extension of social security, other than merely advocating more ratifications of ILO Convention No 102.¹² This new strategy centres around the establishment of the global protection floor, now referred to by the more politically correct term of national floors of social protection.¹³ These floors are to be established with the aid of the new Recommendation No 202, which sets rules for the most essential forms of support: basic healthcare for all, children's welfare, support for the needy at working age and a basic pension system for the elderly.

More specifically, according to Paragraph 5 of Recommendation No 202, the floors should provide at least the following basic social security guarantees: (a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality; (b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services; (c) basic income security, at least at a nationally defined minimum level, for persons inactive age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and (d) basic income security, at least at a nationally defined minimum level, for older persons.¹⁴

The report underlying the Social Protection Floors Recommendation, entitled *Social Protection Floors for Social Justice and Fair Globalization*,¹⁵ frequently uses the concept of 'bridging the gap'. This refers not only to the gap in social security coverage, but also in a wider sense to the gap between the traditional ILO approach and the current human rights approach. In the words of the International Labour Bureau itself: 'In view of the limited ability of up-to-date ILO social security standards to make the right to social security a reality for everyone, a new Recommendation is needed.'¹⁶

11 For a systematic and balanced analysis see R Filali Meknassi, 'Extending Social Security in the Developing Countries: Between Universal Entitlement and the Selectiveness of International Standards' (2006) 27(2) *Comparative Labor Law & Policy Journal* 207.

12 Already advocated by Roger Beattie in: 'Social protection for all: But how?' (2000) 139(2) *International Labour Review* 129. The resolution of the International Labour Conference of 2001 still called for the campaign to expand social security to be based on the relevant social security conventions. See ILO, *Social Security, a New Consensus* (Geneva, 2001) 1, 5.

13 See, among others, Michael Cichon and Krzysztof Hagemejer, 'Changing the Development Policy Paradigm: Investing in a Social Security Floor for All' (2007) 60(2-3) *International Social Security Review* 169.

14 Interestingly, the next Paragraph 6 of Recommendation No 202 calls upon the aid of ILO Convention No 102 when it states that 'Subject to their existing international obligations, Members should provide the basic social security guarantees referred to in this Recommendation to at least all residents and children, as defined in national laws and regulations' (emphasis added) This seems to be a reference to 'all residents' category included in some articles of Convention No. 102, such as article 27 (c).

15 *Social Protection Floors for Social Justice and Fair Globalization*, above n 1.

16 Ibid, consideration no 39.

III. ON THE FUNDAMENTAL DIFFERENCES BETWEEN THE HUMAN RIGHTS APPROACH TO SOCIAL SECURITY AND ILO SOCIAL SECURITY STANDARDS

With the human right to social security encroaching on the social security domain that was previously occupied by the ILO, the question arises what the differences really are between the human rights approach and the ILO standards. Are they in essence the same or is there a hierarchy and a certain qualitative order between the two? In order to answer this question, I will contrast some characteristics of the human rights approach to social security with the ILO standards.

It is not so easy to capture the essence of the human rights approach to social security. While the ILO standards adopted in the conventions have a rather static, consolidating and preserving character, the perceptions of the human right to social security move at high speed in all directions. Here I will concentrate on three distinctions which come to the fore, using General Comment No 19 of the CESCR as a point of reference:

- final state responsibility versus direct state responsibility;
- universal values versus minimum requirements; and
- a rights-based approach versus a state duty approach

Below I will discuss these points with reference to ILO social security standards as they were developed prior to the Recommendation concerning national floors of social protection No 202.

A. Final state responsibility versus direct state responsibility

The human right to social security was first proclaimed in article 22 of the Universal Declaration of Human Rights in 1948. Since then, the right has also been adopted in other international and regional human rights instruments, such as the ICESCR, article 9, the European Social Charter (ESC, article 12) and the EU Charter of Fundamental Rights (CFREU, article 34), and in the human rights instruments of other regions in the world, such as the Charter on Fundamental Social Rights of SADC (article 3). Also, the constitutions of most modern constitutional states—with the notable exception of the UK, which does not have a written constitution—contain either an explicit ‘social state’ clause, or an analytical enumeration of social rights, or both.

There is much conflicting opinion about the meaning of the right to social security as a fundamental right (and socio-economic fundamental rights in general). But there is one thing that cannot easily be contested, namely state responsibility. The inclusion of the right to social security in an internationally binding norm implies that it is the state which must be held accountable for the progress a country makes in the social security field. It is a simple consequence of international law under which states are legally bound to the treaty obligations they have adhered to. It would, for different legal reasons, also be a consequence of inclusion of social security in the national constitutions.¹⁷ In theory, state responsibility does not imply that the right to social security prescribes a specific division of powers between the state, society at large and the individual, let alone that it presupposes that the state should organise or administer social security itself. It can equally be contended that it should not be the state but rather society as a whole that should take primary responsibility, as classic fundamental rights are rather based upon the notion of protection of the individual’s and society’s free sphere. From this point of view it is more plausible to interpret the right to social security as implying that the right to social security could also be implemented by means of contractual rights and obligations between citizens and private parties, under the supervision of public power. Whatever may be said about this, it must be accepted that total lack of involvement on the part of the state is no longer

17 Cf George S Katrougalos, ‘The Implementation of Social Rights in Europe’ (1996) 2 *Columbia Journal of European Law* 277.

an option. Social security is a public concern and when the system as a whole fails to deliver, it is only the state that can be held accountable. Acceptance of social security as a constitutionally and/or internationally binding fundamental right makes it, in the final analysis, a responsibility of the state.

What are the legal obligations arising from state responsibility under international law? According to the ICESCR, the answer is that states must ‘take steps ... to the maximum of its available resources ... to achiev[e] progressively the full realization of the rights ... by all appropriate means ...’ (article 2(1)).¹⁸ Although the concept of ‘progressive realisation’ affords the state some latitude in achieving the full realisation of the right, the CESCR in practice requests states parties to demonstrate that they are moving as expeditiously and effectively as possible towards that goal. Progressive realisation also implies that the States should generally avoid ‘any deliberate retrogressive measures’ which reduce the coverage or level of benefits provided under the social security system.

Meanwhile, various attempts have been made to clarify the legal nature of socio-economic rights. Since the 1980s, a number of scholars have started to differentiate between various types of obligations that may arise from socio-economic fundamental rights: the obligation to respect, the obligation to promote and obligation to fulfil. This method, which is increasingly gaining acceptance among human rights experts, turns out to be relevant for social security as well, as this is and always has been characterised by a mix of state, civil society and market involvement.

The recently adopted General Comment No 19 of the CESCR also makes use of the distinction between the three types of obligations. Without entering into the full contents, let us take a brief look at the outcome of the reasoning. The first obligation is not to interfere negatively in private social security, but to respect its integrity. According to the General Comment:

The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that ... denies or limits equal access to adequate social security; arbitrarily ... interfer[ing] with self-help or customary or traditional arrangements for social security; ... or ... interfer[ing] with institutions that have been established by individuals or corporate bodies to provide social security.¹⁹

Then the General Comment moves on: not only should private social security be respected; its proper functioning must also be protected. A more active role for the state is born, albeit not as direct provider but as regulator. According to the General Comment

The obligation to protect requires that State parties prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures, for example, to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing ... [conditions or providing benefits that are not consistent with the national social security system; or arbitrarily interfering with self-help or customary or traditional arrangements for social security].²⁰

Where social security schemes ... are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security. To prevent such abuses, an effective regulatory system must be established which

18 ICESCR General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

19 CESCR above, n 2, [44] (emphasis added).

20 Ibid [45] (emphasis added).

includes ... independent monitoring, genuine public participation and imposition of penalties for non-compliance.²¹

It is only in the third strand of *the duty to fulfil* that the General Comment requires a more active, direct role of the state. Here, we find the foundation of the welfare state as a whole. States are expected to develop a strategy or policy with regard to the welfare state. In general this is left to the state's discretion, but where it involves the minimal care for those without any protection, setting up a system of social assistance is mandatory. The latter is a typical consequence of this present state obligation theory: the obligation is intense when it comes to guaranteeing the bare essentials; for further entitlements it is diluted. Or, according to the General Comment:

States parties are also obliged to provide the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realize that right themselves, within the existing social security system with the means at their disposal. States parties will need to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection.²²

General Comment No 19, even though a legally non-binding instrument, gives good insight into contemporary thinking on the nature of state responsibility within the context the human right to social security. It is interesting to contrast this thinking with the nature of state responsibility under ILO standards. The standards include minimum requirements which must be guaranteed directly by the state by legislation, or by collective agreements, supervised and administered by the state.²³ They are based upon the presumption that the state is a direct provider of social security, be it only in relation to the prescribed minimum. There is nothing wrong with this focus; the human right to social security also presupposes direct state involvement in some instances, but a wider conceptual framework for a regulatory welfare state²⁴ is missing. Indeed, it may be for this reason that the ILO and its supervisory agency, the Committee of Experts, is on an unsure footing when having to comment upon public/private shifts in social security; it lacks a normative framework to judge such shifts. Incidentally, there might also be another explanation for this. ILO Convention No 102 includes a preference for collective solutions based upon solidarity, expressed amongst others in art. 71(1). Such preference is not so clearly established in the General Comment No 19. For example, nowhere in the text does Recommendation No 19 use the word solidarity, a remarkable *lacuna* for a document which tries to pin down the universal essence of social security!

B. Global acclaim: universal principles versus minimum requirements

The human right to social security and the ILO social security standards both have global acclaim. This is a rather problematic challenge. We do not know exactly what social security is or which social security model should be adopted. Or, as the ILO puts it in its 2001 publication *Social Security, a New Consensus*:

There is no single right model of social security. It grows and evolves over time. There are schemes of social assistance, universal schemes, social insurance and public or private provisions. Each society must determine how best to ensure income security and access to health care. These choices will reflect their social and cultural values, their history, their institutions and their level of economic development.²⁵

21 Ibid [46].

22 Ibid [50].

23 See inter alia ILO Convention No 102, article 6.

24 Cf. Gijsbert Vonk and George Katrougalos, 'The Public Interest and the Welfare State: A Legal Approach' in Gijsbert Vonk and Albertjan Tollenaar (eds), *Social Security as a Public Interest, a Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State* (Intersentia, 2010) 67.

25 ILO, *Social Security* above, n 12, 2.

The global acclaim is also problematic in view of the differences in intensity of social security protection that exist in various parts of the world. Some countries have very developed systems, but the majority are lagging behind or have hardly any form of coverage at all. According to the famous mantra used in the basic social floor campaign, 50% of the world's population still has no form of social protection whatsoever, while for 80% it is insufficient.²⁶ Global standards should both promote the development of social security in poor countries and consolidate successes and facilitate changes in developed countries.

The answer of the human right to social security to the global challenge is different from the one provided by the ILO standards. National courts applying the constitutional right to social security often present basic principles as being part of the 'social state model' in order to counterbalance attacks on social security by the national legislator and/or the private sector.²⁷ In General Comment No 19, basic principles with universal acclaim have been adopted in a triple-A manner. The right is elaborated with reference to *availability* (social security assumes the existence of a system on which certain requirements can be set), *adequacy* (the system must provide a certain degree of protection), and *accessibility* (this last notion is divided in turn into actual access to the system, the affordability for those involved and society as a whole, and the right to information and participation in implementation). Extra attention is directed to the position of groups deserving of protection, such as people working in the informal sector, children, the elderly, the disabled, minorities, and migrants. Also, an attempt has been made to formulate the core content of the right, with general reference to essential primary health care, basic shelter and housing and the most basic forms of education.

The ILO answer to the global challenge is different. ILO standards can be seen to be a mix of statistical and technical requirements which must be satisfied by the national systems. They prescribe percentages of the (working) population that have to be covered, minimum levels of benefit and 'architectural prescriptions' for the setting up of schemes according to the contingencies covered. These are made globally palatable by their minimal character and by a system of flexibility clauses, which allow states to step in at a lower lever or to accept only certain parts of the conventions.

C. A rights-based approach versus a state duty approach

A third characteristic of the human right to social security is the rights-based approach. At its core, this right is built upon the notion that each individual is entitled to social security protection; it is then up to the states to take appropriate steps to realise this right. ILO standards are different; they impose minimum requirements on a state, not for the sake of the individual, but for the project of social security itself. This difference in approach can easily be explained away as mistaken or untrue, so I was happy to find it eloquently expressed by the ILO Committee of Experts itself in its recent publication *Social Security and the Rule of Law*:²⁸

Unlike human rights instruments, ILO standards view social security not as an individual right but rather as a social institution regulated by its own legislative framework, in most cases distinct from that of labour law.

And:

... Whereas human rights instruments primarily establish individual rights, which, in order to be made effective, must be guaranteed by the State, ILO instruments directly focus on

26 For a reasoned argument, see Cichon and Hagemeyer above n 13, 172-175.

27 For an interesting overview of the rulings of constitutional courts in the different regions in the world, see ILO Committee of Experts, *Social Security and the Rule of Law* (ILO 2011) 113-122

28 Ibid 69 [159].

the obligation of the State to secure social security benefits to those having the right to them.²⁹

It is important to keep this difference between the human rights approach and the existing ILO standards in mind. It explains a lot, for example, why previously existing ILO standards are not based upon universal coverage, but rather on the idea of gradual extension of the scope of protection through a global campaign to advance social security. It also explains the fact that General Comment No 19 attaches much importance to the availability of legal remedies for the individual to redress violations of the right to social security, while such norms have been mostly absent from previous ILO-standards. It furthermore helps to explain why the international socio-economic rights framework has moved to the acceptance of an individual complaints procedure,³⁰ while such initiatives have not been developed within the ILO-framework.

IV. DOES THE SOCIAL PROTECTION FLOORS RECOMMENDATION BRIDGE THE GAP BETWEEN ILO STANDARDS AND THE HUMAN RIGHT TO SOCIAL SECURITY?

The Social Protection Floors Recommendation No 202 constitutes a break with the ILO's standards-setting approach adopted over previous decades. This is, first of all, visible in terms of legal techniques. Thus, Recommendation No 202 is the first one actually to codify a number of core principles of social security, rather than only stipulating concrete technical minimum norms. According to paragraph 3 of Recommendation No 202:

Recognizing the overall and primary responsibility of the State in giving effect to this Recommendation, Members should apply the following principles:

- (a) universality of protection, based on social solidarity;
- (b) entitlement to benefits prescribed by national law;
- (c) adequacy and predictability of benefits;
- (d) non-discrimination, gender equality and responsiveness to special needs;
- (e) social inclusion, including of persons in the informal economy;
- (f) respect for the rights and dignity of people covered by the social security guarantees;
- (g) progressive realization, including by setting targets and time frames;
- (h) solidarity in financing while seeking to achieve an optimal balance between the responsibilities and interests among those who finance and benefit from social security schemes;
- (i) consideration of diversity of methods and approaches, including of financing mechanisms and delivery systems;
- (j) transparent, accountable and sound financial management and administration;
- (k) financial, fiscal and economic sustainability, with due regard to social justice and equity;
- (l) coherence with social, economic and employment policies;
- (m) coherence across institutions responsible for delivery of social protection;
- (n) high-quality public services that enhance the delivery of social security systems;
- (o) efficiency and accessibility of complaint and appeal procedures;

²⁹ Ibid 69 [160].

³⁰ Adopted in General Assembly Resolution A/RES/63/117 of the United Nations in 2008 as an Optional Protocol to the ICESCR.

- (p) regular monitoring of implementation, and periodic evaluation;
- (q) full respect for collective bargaining and freedom of association for all workers; and
- (r) tripartite participation with representative organizations of employers and workers, as well as consultation with other relevant and representative organizations of persons concerned.³¹

Formulating core principles is typically a technique employed in the official exegesis of socio-economic fundamental rights. Now such principles have become part of the body of ILO social security standards. Whatever can be said about the choice of principles and the way they are formulated, their potential must not be underestimated. They can serve as a general interpretive framework for existing conventions and recommendations and others yet to be reached. In this sense they also contribute to a revitalisation of the standards as set down in other ILO social security conventions in a manner which is more in line with the requirements ensuing from the human right to social security.

In the second place, the Recommendation adopts a truly universal approach. It sets minimum standards centring on health, children's welfare, income support for the needy, and basic pensions which apply universally for all regions in the world. While there is plenty of flexibility in the way these standards can be established (see below), the floors themselves apply everywhere in the same manner.

Thirdly, the Recommendation embraces the notion of a rights-based approach by emphasising good governance and access to justice, which lie at the core of the human rights approach. These issues are expressed in the general principles Nos (n) and (o) and further elaborated upon in concrete norms. Thus, according to Paragraph 7 of Recommendation No 202:

Basic social security guarantees should be established by law. National laws and regulations should specify the range, qualifying conditions and levels of the benefits giving effect to these guarantees. Impartial, transparent, effective, simple, rapid, accessible and inexpensive complaint and appeal procedures should also be specified. Access to complaint and appeal procedures should be free of charge to the applicant. Systems should be in place that enhance compliance with national legal frameworks.³²

Finally, Recommendation No 202 is less prescriptive as to the nature of the state's role and the social security techniques to be employed. The public social insurance bias found in other social security conventions is no longer visible in the Recommendation. Paragraph 7 simply states that the basic social security guarantees should be established by law. This neutral reference is remarkable, because public service delivery would have been quite justified in the light of the minimum care obligations of the Recommendation. Also as to the social security techniques to be applied, the Recommendation shows great flexibility. In fact, paragraph 9 actually invites the members to use some creativity:

In providing the basic social security guarantees, Members should consider different approaches, with a view to implementing the most effective and efficient combination of benefits and schemes in the national context. Benefits may include child and family benefits, sickness and health-care benefits, maternity benefits, disability benefits, old-age benefits, survivors' benefits, unemployment benefits and employment guarantees, and employment injury benefits, as well as any other social benefits in cash or in kind. Schemes providing such benefits may include universal benefit schemes, social insurance schemes, social assistance schemes, negative income tax schemes, public employment schemes and employment support schemes.

The conclusion to be drawn from this is that the main differences between the two approaches discussed previously are no longer visible in the Recommendation. By setting universal social protection standards and combining these with requirements as to access to justice, Recommendation No 202 also sets a standard as to what each individual citizen in

31 Social Protection Floors Recommendation, above n 1, [3].

32 Ibid [7].

the world can expect from his or her government. In that sense it is capable of sparking off an incipient subjective right to social protection, protected by international law. Such future development, even if it is supported by a mere recommendation, would be a revolutionary one and truly beneficial for the realisation of the human right to social security

V. THE COMPLEMENTARY ROLE OF OLDER ILO SOCIAL SECURITY STANDARDS

The convergence between the ILO social security standards and the human rights approach realised by Recommendation No 202 implies that the success of ILO standards will increasingly be judged in the light of the extent to which they are conducive to realising the right to social security for all. This hierarchical notion can best be expressed in terms of *complementarity*: the ILO standards have a complementary function to the human rights approach. The standards are needed because they formulate concrete norms which are specifically geared towards the architecture and the technique of domestic social security systems. Are the older social security conventions suitable to play this complementary role? Or should the old flagship of ILO Convention No 102 now be relegated to the scrapheap?

However tempting this may be, we should be careful not to engage too much in ‘102-bashing’. It can be called a miracle that the ILO succeeded at the beginning of the 1950s in developing a comprehensive structure of system characteristics that applies to social security as a whole. And even if the convention has only been ratified by a limited number of countries, it continues to serve as a point of reference for the development of national social security systems. Even today, Convention No 102 still prompts fundamental discussions on the system reforms in the countries that have ratified it.

Indeed, the positive effects of the traditional ILO standards approach have been described by Tineke Dijkhoff, in her PhD research entitled *International Social Security Standards in the European Union: The Cases of the Czech Republic and Estonia*.³³ In this study, the author suggested five functions which both the ILO and the Council of Europe standards serve: a benchmarking function, a preserving function, a counterbalancing function, bridging functions and a harmonising function. Dijkhoff’s study of the situation in the two countries brought to the fore some excellent examples of positive effects of standards in terms of functions. For example, in the Czech Republic in 2004, when the amount of pensions dropped below the level prescribed by ILO Convention No 128, measures were taken to restore compliance within one year (preserving function). In Estonia, in order to meet the requirements of the European Code on social security, several adjustments were made, such as an increase in pensions, the introduction of a fixed indexation formula, and the creation of an unemployment insurance scheme (benchmark function). Social security standards are in no way perfect or without any shortcomings, but this does not mean that they are worthless or redundant; they play their own modest role in the overall project of ensuring a fairer system of social security in the world.

As a matter of fact, Recommendation No 202 recognises the added value of other ILO conventions. According to paragraph 17:

[m]embers should aim to achieve the range and levels of benefits set out in the Social Security (Minimum Standards) Convention, 1952 (No 102), or in other ILO social security Conventions and Recommendations setting out more advanced standards.³⁴

Furthermore, according to paragraph 18:

[m]embers should consider ratifying, as early as national circumstances allow, the Social Security (Minimum Standards) Convention, 1952 (No 102).... Members should [also]

³³ Published by Intersentia (2011).

³⁴ Social Protection Floors Recommendation, above n 1, [17].

consider ratifying, or giving effect to, as applicable, other ILO social security Conventions and Recommendations setting out more advanced standards.³⁵

Clearly, the function of paragraphs 17 and 18 is that Recommendation No 202 cannot operate as an excuse to refrain from developing social security further than the bare minimum established by it, or even to reduce existing protective standards.

Having said this, if Convention No 102 is to retain anything of its value, it must not be allowed to become more outdated. Modernisation—in some form or other—is needed. In the first place, the convention must be made gender-neutral. The repeated references to the breadwinner model and the wages of male workers are no longer acceptable. It is rumoured that this is a reason in principle for some countries, including Canada, not to ratify the convention.³⁶ In the second place, the standards must be better matched to the modern policy agenda and the systems based on it. This entails that regulated privatisation, types of personal savings, and fiscal measures must be given equal footing with respect to public social insurance, as long as certain preconditions are satisfied, of course. Finally, simplification would not be a bad thing. The existing standards are sometimes unnecessarily complex and detailed. It has been proved, with regard to Europe, that it is possible to modernise a treaty of the magnitude of Convention No 102. The old European Code with regard to social security, which was set up in 1964 as a European variant of Convention No 102, was entirely revised in 1990. It must be acknowledged however that it remains to be seen which countries will come forward to sign the new version, but perhaps the situation will improve now that the Netherlands has lead the European flock into ratification.³⁷

VI. CONCLUSION

In this paper I have argued that ILO standards are complementary to the right to social security. The newly adopted Social Protection Floor Recommendation No 202 is better suited to this complementary role than previous social security standards. The main qualitative differences between the modern interpretation of the right to social security as expressed in CESC Recommendation No 19 and the ILO standards, in terms of the role of the state, universality and the rights-based approach, are no longer visible in the youngest ILO Recommendation No 202. By setting universal social protection standards and combining these with requirements as to access to justice, Recommendation No 202 also sets a standard as to what each individual citizen in the world can expect from his or her government. In that sense it is capable of sparking off an incipient subjective right to social protection, to be protected by international law. This is truly a revolutionary development, even supported by a mere recommendation. The older conventions, in particular Convention No 102, continue to play a role, but need to be modernised if they are to be a suitable point of reference for the further development of social security systems in the world.

35 Ibid [18].

36 On occasion I have heard the argument that ILO Convention No 102 is not outdated on these points because of the fact that in many countries men are still the breadwinners and earn more. But this reasoning overlooks that from a normative point of view the breadwinners concept is considered to be indirectly discriminatory towards women. For that reason, it is explicitly prohibited in equal treatment instruments, such as EU Directive 79/7/EC.

37 The Netherlands ratified the revised Code on social security in 2009.